National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEALS NO 01-8 OF 1998 (W) AND 02-18 OF 1998 (W)

CHONG SIEW FAI CJ (SABAH AND SARAWAK), MOHAMED DZAIDDIN AND ABDUL MALEK AHMAD FCJJ

30 JUNE 2000

Labour Law *— Trade union — Eligibility to represent employees — Query to Director General of Trade Unions under s 26(1A) of Trade Unions Act 1959 —Competency of Director General of Trade Unions to decide on trade union's eligibility to represent employees — Whether query should have been made under s 9(4B)(b) of Industrial Relations Act 1967 and s 15(2)(b) of Trade Unions Act 1959 instead of using s 26(1A) — — Whether s 26(1A) can be applied to render entire membership of union in respondent companies not eligible as members of union*

The appellant ('NUPW') was a trade union which was initially recognized by the Federal Publications Sdn Bhd ('FPSB') and the STP Distributors (M) Sdn Bhd ('STPD') as a trade union which represented their employees. By similar letters dated 26 December 1990, FPSB and STPD had raised to the Director General of Trade Unions ('DGTU') the fact that as their business activities had no longer any connection with the newspaper publishing industry, the eligibility of the NUPW to represent their employees was then the subject of dispute. Accordingly they had asked the DGTU for a ruling on the matter. The DGTU decided that the employees of FPSB and STPD cannot be accepted as or continue to be members of the NUPW considering the fact that they were no longer categorized as employees of the newspaper publishing and subsidiary industries as provided in r 3.1 of the NUPW's rules and constitution. The NUPW applied for certiorari against the DGTU. The NUPW raised the issue of the competency of the DGTU to entertain and consequently to decide on NUPW's eligibility to represent the employees of FPSB and STPD in accordance with s 26(1A) of the Trade Unions Act 1959 ('the TUA'). It was submitted that any query should have been made under s 9(4B)(b) of the Industrial Relations Act 1967 ('the IRA') or the DGTU should have exercised his powers under s 15(2)(b) of the TUA. The High Court agreed with that submission and granted the order in terms with costs. Hence the appeal to the Court of Appeal. The Court of Appeal allowed the appeal. The appellant appealed.

Held, dismissing the appeal:

(1) The court agreed with the finding of the Court of Appeal that there was nothing in the TUA that prevented any one from seeking a ruling from the DGTU and similarly, there was no provision that disallowed the DGTU from entertaining such a query. The High Court judge was in error when he agreed with the submission of the appellant that s 9(4B)(b) of the IRA and

s 15(2)(b) of the TUA should have been resorted to instead of using s 26(1A) of the TUA. In particular, s 9(4B)(b) of the IRA only applies where recognition is sought to be accorded to the trade union which was not the case here. In actual fact, the power of the DGTU when faced with the query from FPSB and STPD must come from s 4A of the TUA (see pp 695C–E, 696C).

(2) Section 26(1A) of the TUA can be applied by the DGTU to render the entire membership of the union in the respondent companies not eligible and the union incompetent to represent the entire membership and it can be invoked and applied to de facto derecognize a union and disunionize members (see p 696E–F).

[Bahasa Malaysia summary

Perayu ('NUPW') adalah suatu kesatuan sekerja yang pada mulanya diiktiraf oleh Federal Publications Sdn Bhd ('FPSB') dan STP Distributors (M) Sdn Bhd ('STPD') sebagai kesatuan sekerja yang mewakili pekerja-pekerjanya. Dengan surat-surat yang sama bertarikh 26 Disember 1990, FPSB dan STPD telah memberitahu Ketua Pengarah Kesatuan Sekerja ('DGTU') hakikat bahawa oleh kerana aktiviti-aktiviti perniagaan mereka tidak lagi mempunyai sebarang perkaitan dengan industri penerbitan surat khabar, kelayakan NUPW untuk mewakili pekerja-pekerja mereka menjadi subjek yang dipertikaikan. Maka mereka meminta DGTU untuk membuat keputusan mengenai perkara tersebut. DGTU memutuskan bahawa pekerja-pekerja FPSB dan STPD tidak boleh diterima sebagai atau terus menjadi ahli NUPW memandangkan hakikat bahawa mereka bukanlah lagi dikategorikan sebagai pekerja penerbitan surat khabar dan industri-industri subsidiari seperti yang diperuntukkan di dalam k 3.1 kaedah dan perlembagaan NUPW. NUPW memohon untuk certiorari terhadap DGTU. NUPW membangkitkan isu kompetens DGTU untuk melayan dan dengan itu memutuskan kelayakan NUPW untuk mewakili pekerja-pekerja FPSB dan STPD menurut s 26(1A) Akta Kesatuan Sekerja 1959 ('TUA'). Adalah dihujahkan bahawa sebarang pertanyaan sepatutnya dibuat di bawah s 9(4B)(b) Akta Perhubungan Perusahaan 1967 ('IRA') atau DGTU sepatutnya melaksanakan kuasa-kuasanya di bawah s 15(2)(b) TUA tersebut. Mahkamah Tinggi bersetuju dengan hujahan tersebut dan memberikan perintah yang dipohon dengan kos-kos. Dengan itu rayuan dibuat ke Mahkamah Rayuan. Mahkamah Rayuan membenarkan rayuan tersebut. Perayu telah merayu.

Diputuskan, menolak rayuan tersebut:

(1) Mahkamah bersetuju dengan penemuan Mahkamah Rayuan bahawa tidak terdapat apa-apa di dalam TUA yang menghalang sesiapa daripada memohon suatu keputusan daripada DGTU

dan juga tiada peruntukan yang tidak membenarkan DGTU daripada melayan persoalan sedemikian. Hakim Mahkamah Tinggi telah silap apabila beliau bersetuju dengan hujahan perayu bahawa s 9(4B)(b) IRA dan s 15(2) TUA sepatutnya dipakai dan bukan sebaliknya memakai s 26(1A) TUA. Secara khusus, s 9(4B)(b) IRA hanya terpakai di mana pengiktirafan dipohon untuk diberikan kepada kesatuan sekerja yang bukan kesnya di sini. Hakikatnya, kuasa DGTU apabila berdepan dengan persoalan daripada FPSB dan STPD mestilah timbul daripada s 4A TUA (lihat ms 695C–E, 696C).

(2) Seksyen 26(1A) TUA boleh dipakai oleh DGTU untuk menjadikan keseluruhan keahlian kesatuan tersebut di dalam syarikat-syarikat responden tidak layak dan kesatuan tersebut tidak layak untuk mewakili keseluruhan keahlian dan ia boleh dibangkitkan dan dipakai untuk tidak mengiktiraf lagi suatu kesatuan dan membatalkan keahlian kesatuan secara de facto (lihat ms 696E–F).]

Notes

For cases on trade union generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1184–1236.

Cases referred to

Electrical Industry Workers Union v Registrar of Trade Unions & Anor [1976] 1 MLJ 177 (refd)

Electrical Industry Workers Union v The Honourable Minister of Labour and Manpower, The & The Registrar of Trade Unions Kuala Lumpur High Court Originating Motion No A11 of 1981 (unreported) (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

Legislation referred to

Industrial Relations Act 1967 s 9(4B)(b)
Trade Unions Act 1959 ss 4A, 15(2)(b), 26(1A)
Trade Unions Ordinance 1959 s 26(1A)

Appeal from: Civil Appeals No W–91–141 of 1995 and No W–02–655 of 1995 (Court of Appeal, Kuala Lumpur)

Ramdas Tikamdas (*Siva Ram & Associates*) for the appellant in Civil Appeal No 01–8 of 1998 (W).

Mahamad Naser bin Disa (Senior Federal Counsel) (*Ishak bin Bakri* with him) (Attorney General's Chambers) for the respondent in Civil Appeal No 01–8 of 1998 (W).

Ramadass Arumugam (*Jothiletchimy Maniam* with him) (*Ramadass & Associates*) for the respondent in Civil Appeal No 02–18 of 1998 (W). A

Abdul Malek Ahmad FCJ (delivering judgment of the court): The National Union of Newspaper Workers ('the NUPW'), who is the appellant before us, had applied for certiorari against the Director General of Trade Unions ('the DGTU'), who is the respondent in MPRS No 01–8–98 (W) ('the first appeal') and against Federal Publications Sdn Bhd ('FPSB') and the STP Distributors (M) Sdn Bhd ('STPD') who are the first and second respondents in MPRs No 02–18–98 (W) ('the second appeal') to quash the decision of the DGTU on 25 February 1992. B

The facts of the matter before the High Court were as follows. NUPW was a trade union which was initially recognized by FPSB and STPD as a trade union which represented their employees. C

By similar letters dated 26 December 1990, FPSB and STPD had raised, to the DGTU, the fact that as their business activities had no longer any connection with the newspaper publishing industry, the eligibility of the NUPW to represent their employees was then the subject of dispute. D Accordingly, they had asked the DGTU for a ruling on the matter.

It is relevant to reproduce the relevant portions of the contents of the letter from FPSB to the DGTU at this juncture:

> Dear Sir E
>
> *Re: Rule 3 of the Constitution of the National Union of Newspaper Workers*
>
> The National Union of Newspaper Workers had been representing our employees since 1971 by virtue of our Company being a wholly owned subsidiary of Times Publishing Ltd which until recently had links with the newspaper publishing industry.
>
> Recent corporate events have brought about a change in the position of our Company which may affect the standing of the National Union of Newspaper Workers to represent our employees. The purpose of this letter is to seek your ruling on the issue. F
>
> ...
>
> By reason of the matters set out above, we would be grateful if you could investigate into and make a ruling on whether or not the National Union of Newspaper Workers may continue to represent the employees of Federal Publications Sdn Bhd. G

On 12 November 1991, the DGTU carried out investigations and discovered that FPSB was involved with the publication of local text books whereas STPD was in the distribution and marketing of books, magazines and encyclopedias with no involvement at all in the newspaper publishing industry. H

Consequently, on 15 November 1991, the DGTU had invited the Secretary General of the NUPW to come to his office to discuss the matter which the latter did on 27 November 1991. The NUPW gave their views by letter to the DGTU on 11 December 1991 insisting that they still had a right to represent the employees of FPSB and STPD. I

By letter dated 25 February 1992, the DGTU decided that the employees of FPSB and STPD cannot be accepted as, or continue to be, members of the NUPW considering the fact that they were no longer categorized as employees of the newspaper publishing and subsidiary industries as provided in r 3.1 of the NUPW's Rules and Constitution.

Thus the application for certiorari. The said r 3.1 states:

> Rule 3 — MEMBERSHIP
>
> 1 Membership of the Union shall be open to all employees in the newspaper publishing and subsidiary industries excluding those who are employed in the managerial, executive capacity, confidential capacity and security capacity who are above the age of sixteen and whose place of work is in Peninsular Malaysia provided that no person for whom education is provided under the Education Act shall join or be a member of the Union, unless he is:
>
> (a) bona fide employed as a workman as defined in the Trade Unions Ordinance 1959, and
>
> (b) over the age of eighteen years.

One of the issues raised at first instance was the competency of the DGTU to entertain and consequently to decide on NUPW's eligibility to represent the employees of FPSB and STPD in accordance with s 26(1A) of the Trade Unions Act 1959 ('the TUA'). It was the submission of learned counsel for the NUPW that the procedure adopted by FPSB and STPD in sending the letter dated 26 December 1990 to the DGTU was irregular and did not confer the DGTU with any jurisdiction to make the ruling which is now disputed.

It is pertinent to reproduce s 26(1A) of the TUA at this point:

> No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered.

Learned counsel for the NUPW's submission in the High Court, which was touched on in the Court of Appeal's judgments, was that any query should have been made under s 9(4B)(b) of the Industrial Relations Act 1967 ('the IRA') or the DGTU should have exercised his powers under s 15(2)(b) of the TUA.

For ease of reference, it is also relevant to restate the provisions of both s 9(4B)(b) of the IRA and s 15(2)(b) of the TUA to appreciate the effect of this submission:

> 9(4B) For the purpose of carrying out his functions under sub-s (4A) the Director General —
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> (a) ... ; and
>
> (b) may refer to the Director General of Trade Unions for his decision any question on the competence of the trade union of workmen concerned to represent any workmen or class of workmen in respect of whom recognition is sought to be accorded, and the performance of duties and functions by the Director General of Trade Unions

under this paragraph shall be deemed to be a performance of his duties and functions under the written law relating to the registration of trade unions.

15(2)Where two or more registered trade unions exist in a particular trade, occupation, industry or place of employment, as the case may be, the Director General may, if he is satisfied that it is in the interest of the workmen in that trade, occupation, industry or place of employment so to do —

(a) ... ; or

(b) issue an order requiring the trade union or trade unions other than the trade union which has the largest number of workmen in the said trade, occupation, industry or place of employment as its members to remove from the membership register those members as are employed in that trade, occupation, industry or place of employment and thereafter the trade union or trade unions so ordered shall not enrol as members workmen in that trade, occupation, industry or place of employment, except with the permission in writing of the Director General; an order under this paragraph shall have full force and effect notwithstanding any provision of the rules of the trade union concerned.

The learned High Court judge agreed with that submission and had granted the order in terms with costs. Hence the appeal to the Court of Appeal. The Court of Appeal, in two separate written judgments, allowed the appeal which have resulted in the appeals before us.

The judgment of Siti Norma Yaakob JCA clearly summarizes the 'recent corporate events' mentioned in the two letters dated 26 December 1990 as follows:

> Both the second and third appellants, were at one time wholly owned subsidiaries of Times Publishing Ltd, a newspaper publishing company incorporated in Singapore on 7 March 1968, as a private limited company. Since its inception in 1957, the second appellant has been engaged in the publication of local books and general interest books whilst the third appellant has, since its inception in 1978, been involved in the direct selling of encyclopaedia and language tapes and the retailing of local books and the distribution of imported books and magazines.
>
> Both the second and third appellants were never in anyway engaged or involved in the operation of the newspaper publishing industry. However in view of the fact that they were historically wholly owned by Times Publishing Ltd, who held a 20% shareholding in New Straits Times (Malaysia) Sdn Bhd which publish and print newspapers, they were joined as partners to the collective agreements concluded between Times Publishing Ltd and the Union which by virtue of r 3 of its Constitution represented workers in the newspaper publishing and subsidiary companies.
>
> In April 1984, Times Publishing Ltd relinquished its 20% shareholding in New Straits Times (Malaysia) Sdn Bhd and in November the same year merged with two other companies, The Straits Times Press (1975) Ltd and Singapore News and Publications Ltd to form Singapore Press Holdings Ltd. Times Publishing Ltd became the holding company for all non-newspaper operations of the Singapore Press Holding Group. This included the second

A and third appellants. Subsequently in November 1988, Times Publishing Ltd was demerged from the Group and became an independent listed company in March 1989, thereby severing any link it had with the second and third appellants.

It was following the severance of their business activities from the newspaper publishing industry that both the second and third appellants B wrote the letters referred to earlier seeking a ruling from the first appellant as to whether the Union could continue to represent their employees in view of r 3.1 of the Union's Rules and Constitution prohibiting employees engaged in the non-newspaper publishing and subsidiary industries from being members of the Union.

C The Court of Appeal was of the view that by the letters from FPSB and STPD to the DGTU, it was just to get the proper official interpretation of r 3.1 of the NUPW's Rules and Constitution since they were faced with the nagging doubt as to whether the NUPW could continue to represent their employees as their link to their holding company had been severed.

They consequently found that there was nothing in the TUA that D prevented any one from seeking a ruling from the DGTU and similarly, there was no provision that disallowed the DGTU from entertaining such a query.

The Court of Appeal also held that the learned High Court Judge was in error when he agreed with the submissions of learned counsel for the E appellant that s 9(4B)(b) of the IRA and s 15(2)(b) of the TUA should have been resorted to instead of using s 26(1A) of the TUA.

On this point, the relevant passages in the Court of Appeal judgment written by Siti Norma Yaakob JCA state:

> For this the learned judge held that the first appellant should have followed F the procedure laid by s 9 of the Industrial Relations Act 1967. Section 9 forms part of Part III of the 1967 Act which is headed 'RECOGNITION AND SCOPE OF REPRESENTATION OF TRADE UNIONS'.
>
> Section 9 in particular refers to 'Claim for recognition' and from a perusal of its many subsections, it is clear that what that section seeks to do is to set out the procedure by which a trade union can successfully initiate the process G of seeking recognition to represent the workers of a potential employer. That can be done in writing in the prescribed form under sub-s (2). In so doing the employer may question the eligibility of his employees to be represented as employees in the managerial, executive, confidential and security capacities are expressly disqualified under sub-s (1). Any dispute as to their eligibility to be members may under sub-s (1A) be referred by a trade union or workmen or by the employer or by a trade union of employers to the Director General H who under sub-s (4A) may resolve the matter by exercising his powers under sub-s (4B) or if the matter cannot be resolved shall under sub-s (4C) notify the Minister, who in the exercise of his powers under sub-s (5) shall give his decision which under sub-s (6) shall be final and shall not be questioned in any court of law.
>
> I Clearly all the subsections that I have referred to so far cannot be applicable to the instant appeals as they relate to situations where recognition is being sought which does not cover the situation before us as recognition has already been accorded to the Union.

> Finally I come to s 15(2)(b) of the Act which the learned trial judge found should have been invoked by the first appellant. Section 15 deals with the circumstances when the first appellant can cancel or withdraw the registration of a trade union. Subsection (2) is concerned with the existence of two or more trade unions in a particular trade, occupation, industry or place of employment and para (b) of that subsection empowers the first appellant to deal with the matter. Clearly sub-s (2)(b) reflects the purpose and objective of trade unions in that only one trade union registered for a particular trade, industry, occupation and establishment can represent employees engaged in similar interests. Such is the case at hand and to that end s 15(2) (b) has no relevancy.

In particular, s 9(4B)(b) of the IRA only applies where recognition is sought to be accorded to the trade union which is not the case here. In actual fact, the Court of Appeal found that the power of the DGTU when faced with the query from FPSB and STPD must come from s 4A of the TUA which reads:

> In addition to the powers, duties and functions conferred on the Director General by this Act and any regulations, the Director General shall have and may exercise all such powers, discharge all such duties and perform all such functions as may be necessary for the purposes of giving effort to and carrying out the provisions of this Act.

We have no quarrel with the findings of the Court of Appeal and find no reason to disagree with their reasoning.

When leave to appeal was granted by this court on 23 November 1998, the two questions posed were:

(a) whether s 26(1A) of the TUA can be applied by the DGTU to render the entire membership of the union in the respondent companies not eligible and the union incompetent to represent the entire membership? and

(b) whether s 26(1A) of the TUA can be Invoked and applied to de facto derecognize a union and disunionize members when it Is admitted that nothing has changed in respect of the establishment, trade, occupation or industry concerned?

In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, this court held that decisions which are susceptible to judicial review can be impugned on the basis of illegality, irrationality, procedural impropriety and proportionality. Therefore, there is a legal basis to review the award of the Industrial Court for substance as well as for process. Appellate jurisdiction is concerned with legality. The intensity of the court's review of administrative action may vary according to the nature of the case, for example, cases involving human rights and liberty will involve a more rigorous examination of the exercise of power.

At pp 463–465 of that judgment, they said:

> In *Dunlop Estate Bhd v All Malaysian Estates Staff Union* [1980] 1 MLJ 243 at p 246, Mohd Azmi J (as he then was) held:
>
> > 'In my view, having regard to the principles enunciated in the cases cited, the Industrial Relations Act, being a social legislation enacted with the

A prime object of attaining social justice and industrial peace, demands practical and realistic interpretation whenever necessary, for the purpose of maintaining good relationship and fair dealings between employers and workers and their trade union, and the settlement of any differences or disputes arising from their relationship.'

B In *Nathan v Barnet London Borough Council* [1978] 1 WLR 220 at p 228, in (sic) a case involving an industrial relations matter of unfair dismissal, Lord Denning held:

'Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court. The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach.' ... In all cases now C in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation the judges can and should use their good sense to remedy it — by reading words in, if D necessary — so as to do what Parliament would have done, had they had the situation in mind.'... It is clear that the High Courts and the Federal Court have adopted a liberal and progressive approach in certiorari proceedings, and I find that where the particular facts of the case warrant it the High Court should endeavour to remedy an injustice when it is brought to its notice rather than deny relief to an aggrieved party on E purely technical and narrow grounds. The High Court should mould the relief in accordance with the demands of justice.'

The Court of Appeal in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317 said that it is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of F law for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations, what may be conveniently termed an *Anisminic* error, or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general G law.

Learned counsel for the respondent argued that the DGTU has the power to make a decision under s 4A of the TUA, which was added to the TUA together with s 26(1A) vide Act A483, which decision was correct in this case as there is no comma appearing after the word 'newspaper' in r 3.1 of the Rules and Constitution of the NUPW meaning that the members of H the NUPW must be employees of the newspaper publishing and subsidiary industries, of which FPSB and STPD are no longer active in. He also submitted that the DGTU was not influenced by the fact of any corporate manoeuvre or the change in the shareholding of the relevant companies. Further, he stressed that the members affected are at liberty to choose to I join some other union relevant to their employment.

In the unreported case of the *The Electrical Industry Workers Union v The Honourable Minister of Labour and Manpower & The Registrar of Trade Unions*

(Kuala Lumpur High Court Originating Motion No A11 of 1981), the Director General requested the Registrar of Trade Unions to make a decision on the competency of the union to represent the employees of the company. Hashim Yeop Sani J (as he then was) was of the view that the Registrar has power under s 26(1A) of the Trade Unions Ordinance 1959, the forerunner to the TUA, to determine the question of membership of a union. In another part of the judgment, the learned judge commented that the whole function of certiorari is aimed at the examination of the record and that, in a certiorari proceeding, the court is acting as a supervisory court and not as an appellate court. It became quite plain to the court in that case that the union was attempting to question the merits of the decision. The learned judge accordingly held that it is clear that the legislature has entrusted on the Registrar and the Minister a discretion to decide on the membership and representation by the union and the courts should not usurp this function and embark on a rehearing of the matter.

In *Electrical Industry Workers Union v Registrar of Trade Unions & Anor* [1976] 1 MLJ 177, the Federal Court held that whether a person in a related or similar industry becomes a member of a particular union is squarely a matter for the decision of the Registrar of Trade Unions. If a particular union can say that it is for that union to decide whether those in another industry might be absorbed as members of the union, a dangerous situation would develop whereby each and every union in the country would do the same and this could produce disastrous results for the country.

We would answer both questions in the positive, dismiss both appeals with costs and order that the relevant deposits are to go to the respondents to the account of their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar